IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 848.

MARY W. STEWART, *et al.*, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITIONERS' REPLY BRIEF.

J. M. MANNON, JR.,
A. CRAWFORD GREENE,
ALLAN P. MATTHEW,
ROBERT L. LIPMAN,
Attorneys for Petitioners.

W. H. SPAULDING,
THOMAS E. PALMER,
McCUTCHEN, OLNEY, MANNON & GREENE,
Of Counsel.

April 27, 1942.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX TO BRIEF.

Subject Index.

	Page
Introductory	1
I. *Stare Decisis.* The Court of Appeals Was Not Free to Disregard the Decision in the Irwin Case	2
II. The Statute of Limitations	5
III. Equitable Estoppel	8
IV. The Findings of the Trial Court That the Lands in Suit Are Not a Part of Mare Island and Were Not within the Castro Grant of the Confirmation Decree Were Amply Supported by the Evidence and Should Have Been Accepted by the Court of Appeals	14
Conclusion	15

Appendix.

The Grant to Castro Did Not Include the Lands in Suit Nor Were They Embraced Within the Confirmation Decree	16

TABLE OF CASES AND AUTHORITIES CITED.

Cases Cited.

Causey v. *United States* (1916), 240 U. S. 399	12
Chandler-Dunbar Water Power Co., United States v. (1908), 209 U. S. 447	6, 7, 11
Coronado Beach Co., United States v. (1921), 255 U. S. 472	17
Cramer v. *United States* (1923), 261 U. S. 219	13
Hussey v. *United States* (1911), 222 U. S. 88	5
Irwin, San Francisco Savings Union v. (1886), 28 Fed. 708	2, 3, 4, 8, 9, 10, 16
Irwin v. *San Francisco Savings Union* (1890), 136 U. S. 578	2, 3, 4, 8, 9, 10
Insular Government, Jover v. (1911), 221 U. S. 623	16
Jeems Bayou etc. Club v. *United States* (1923), 260 U. S. 561	12
Jover v. *Insular Government* (1911), 221 U. S. 623	16

Page

Lee Wilson & Co. v. *United States* (1917), 245 U. S. 24 12
Minnesota, United States v. (1926), 270 U. S. 181, 208 4
Mulford, Ward v. (1867), 32 Cal. 365 17
O'Donnell, United States v. (1938), 303 U. S. 501, 3, 9, 10, 18
Osterhaus, Sawyer v. (1914), 212 Fed. 765 4
Roseberry, Wright v. (1887), 121 U. S. 488 ..... 3, 4
San Francisco Savings Union v. *Irwin* (1886), 28 Fed. 708 ..... 2, 3, 4, 8, 9, 10, 16
San Francisco Savings Union, Irwin v. (1890), 136 U. S. 578 ..... 2, 3, 4, 8, 9, 10
Sawyer v. *Osterhaus* (1914), 212 Fed. 765 4
Teschemacher v. *Thompson* (1861), 18 Cal. 11 17
United States, Causey v. (1916), 240 U. S. 399 12
United States v. *Chandler-Dunbar Water Power Co.* (1908), 209 U. S. 447 ..... 6, 7, 11
United States v. *Coronado Beach Co.* (1921), 255 U. S. 472 17
United States, Cramer v. (1923), 261 U. S. 219 13
United States, Hussey v. (1911), 22 U. S. 88 5
United States, Jeems Bayou etc. Club v. (1923), 260 U. S. 561 12
United States, Lee Wilson & Co. v. (1917), 245 U. S. 24 12
United States v. *Minnesota* (1926), 270 U. S. 181, 208 .. 4
United States v. *O'Donnell* (1938), 303 U. S. 501 .. 3, 9, 10, 18
Utah Power & Light Co. v. *United States* (1917), 243 U. S. 389 11
Ward v. *Mulford* (1867), 32 Cal. 365 17
Wilson & Co. v. *United States* (1917), 245 U. S. 24 12
Wright v. *Roseberry* (1887), 121 U. S. 488 ..... 3, 4

STATUTES CITED.

U. S. C., Title 43, Sec. 1166 5

TEXTBOOKS CITED.

Pomeroy, Equity Jurisprudence (5th ed.) Sec. 818 11

COURT RULES CITED.

Rule 52(a), *Rules of Civil Procedure* 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 848.

MARY W. STEWART, *et al.*, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITIONERS' REPLY BRIEF.

INTRODUCTORY.

This reply brief will conform essentially with the order observed in petitioners' opening brief. In the interest of brevity the discussion of principles of equity and the defense of equitable estoppel will be included in a single subdivision (III).

Petitioners' contentions upon the issue of fact have been adequately developed in our opening brief (Point V, pages 63-70 and appendix). Our reply to the opposing presentation will be found in the appendix hereto.

I.

STARE DECISIS.

The Court of Appeals Was Not Free to Disregard the Decision in the Irwin Case.

We have urged in our opening brief that inasmuch as the identical claims now made by the Government to the identical lands here in suit were adjudicated adversely to the United States in *San Francisco Savings Union* v. *Irwin* (1886) 28 Fed. 708, affirmed by this Court in *Irwin* v. *San Francisco Savings Union* (1890) 136 U. S. 578, and inasmuch as that decision was allowed to go unchallenged for 40 years, it became a part of the law of the title and the Court of Appeals was not free to disregard it. (Ptnrs. Br. 18-26). At page 43 of its brief the Government concedes that it is "familiar doctrine that where titles to land may be affected the courts strictly adhere to the doctrine of *stare decisis*". Obviously, this is a recognition of the essential validity of the principle upon which we rely.

We have further pointed out (Ptnrs. Br. 21), and in the very nature of the principle it necessarily follows, that the rule requires the strictest adherence to the earlier decision where the identical title to the identical lands is again under attack, based upon the precise claim previously made and adjudicated. Such cases are, as would be expected, not as common as those which invoke only the more general doctrine, but we have cited a number of them in our opening brief (pages 21-25) and the Court will note the special strictness with which the doctrine is in such cases applied. Even where the prior decision turns upon a question which is largely one of fact or of mixed law and fact—such as the construction of a particular instrument—the courts regard the determination as being the law of the particular title which, after the decision has long stood, they do not feel free to disturb. Upon principle it should be so, for otherwise there can be no stability of land titles based upon adjudication.

In petitioners' opening brief we stated that after the affirmance by this Court of the decision in the *Irwin* case in 1890, the result was accepted as final by everyone. The Government's brief disagrees with this statement (Govt. Br. 11-14), but in our view without warrant.

The brief for the Government goes outside of the record in this case and points to material in the record in the *O'Donnell* case with a view to showing that there was a considerable delay after the *Irwin* decision before the last of the lands in Survey 569 were platted and patented—the intended inference being that this serves to show that the *Irwin* decision was not accepted as final. The fact is that most of this evidence relates primarily to *Survey 34** and it was the controversy as to *those* lands that delayed the final approval of the township plats and hence the issuance of petitioners' final patent. The record here affirmatively shows that, because of the *Irwin* decision, the Navy no longer claimed the land in *Survey 569* and accordingly First Assistant Secretary of the Interior Finney ordered the land patented. (Ex 37, R. III—260, 262-263) Thereupon, without any protest, it was patented. The first attack upon the *Irwin* decision was the filing of the instant suit.

The Government's brief criticises the opinion in the *Irwin* case in several particulars with a view to showing that the case was wrongly decided. Were the criticisms valid they would afford no reason, after all these years, to depart from the decision. The precise purpose of the rule of *stare decisis* is to afford protection to those who rely on decisions of long standing against the vicissitude of later change. We are unwilling, however, to let the attack upon the *Irwin* decision go unanswered, because in all particulars essential to petitioners' case here the criticisms in the Government's brief are without merit.

The Government's brief asserts that, so far as the principle of *Wright* v. *Roseberry* as to maintaining an action of ejectment upon a swamp land title before patent has been issued by the United States is concerned, the decision has

---

*All emphasis throughout this brief is ours unless expressly otherwise noted.

been repudiated. (Govt. Br. 37) If so, the matter is of no moment since the case at bar in no respect turns upon that principle. Patents have been issued here, many years since.

Even less to the point is the suggestion that Mr. Justice Field expressed doubt whether the United States, not being suable without its consent, could acquire title by adverse possession. His decision that no such possession was in fact shown is indisputably correct. And it need hardly be added that the Government has never, since 1890, been in possession of any portion of the land in litigation here, adverse or otherwise.

The Government's brief suggests that the decision of Mr. Justice Field is vulnerable in so far as it holds (28 Fed. 715) that after Congress had granted these lands in 1850 it was not competent for the President to revoke the grant by a reservation made in 1853. The Government has overlooked the fact that Judge Van Fleet's contrary conclusion in *Sawyer* v. *Osterhaus* (1914) 212 Fed. 765 was rejected by this Court in the later case of *United States* v. *Minnesota* (1926) 270 U. S. 181, 208, where it was clearly indicated that it was not competent for the Government to revoke a grant made by the Swamp Land Act.

Finally, the opposing brief seeks to avoid the effect of the *Irwin* decision upon the ground that Mr. Justice Field erroneously held the land to be below the line of ordinary high-water mark. This again impresses us as a diversion. In our brief we have shown that Mr. Justice Field could not have so held because the land would then have been tide land and would not have passed under the Swamp Land Act. (Ptnrs. Br. 29-30) It might appropriately be added that, had it been the thought of Mr. Justice Field that the land was below ordinary high-water mark, there would have been no occasion for him to discuss whether, prior to patent, the plaintiffs could prove the swamp land character of the land —which was the main question in the case. Nor would there have been occasion for this Court to affirm the decision on that very point under the authority of *Wright* v. *Roseberry*. The circumstance that this was the principal point discussed in the opinion shows that Mr. Justice Field could not

have intended to decide that the lands were tide lands and hence completely outside the Swamp Land Grant. The express holding that they were within the Act excludes the Government's contention that he held them to be below the line of ordinary high-water.

The Government's brief asserts (page 44) that *Hussey* v. *United States* (1911) 222 U. S. 88 involved "a contention similar to that urged by petitioners". The Government appears to have misconstrued the case, for it does not involve the principle of *stare decisis* at all. There the plaintiff purchased *before* the prior adjudication—not after and in reliance upon it. All that the Court held was that in such circumstances the prior decision was not a rule of property and was not *res judicata* against the United States.

The Government's brief fails to cite any case wherein, a prior adjudication of the identical title having been allowed to stand for many years so that those dealing with the title must necessarily have relied thereon, the courts have later felt free to depart from the earlier adjudication. The cases which we have cited (Ptnrs. Br. 21-25) convincingly show that in such circumstances the courts will not disturb the earlier determination.

II.

THE STATUTE OF LIMITATIONS.

In our opening brief (pages 32-40) it was shown that as to Swamp Land Patents 52 and 172 issued, respectively, 34 and 20 years before this suit was brought, the action is barred by the federal six-year statute of limitations which provides:

> "Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents." (U.S.C., Title 43, § 1166)

Although the patents involved are ordinary swamp land patents the Government claims that an exception should be read into the statute so as to exclude these patents from its operation. It is not represented that this case is not within

the mischief aimed at by the statute. The gross inequity of the result reached by the majority of the Court of Appeals makes plain the need of statutory protection against belated attacks.

The Government's contention comes to this: that the lands in suit, being (so it is claimed) within the Castro grant, were not subject to the jurisdiction of the Land Department, that the patents are nullities, and that the statute affords petitioners no protection. We have replied (Ptners. Br. 37-38) that such was the situation in *United States* v. *Chandler-Dunbar Water Power Company* (1908) 209 U. S. 447. The Court, speaking through Mr. Justice Holmes, assumed that the land, being within a military reservation, was not subject to the jurisdiction of the Land Department but went on to say:

> "It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared to be void. When it refers to 'any patent heretofore issued', it describes the purport and source of the document, not its legal effect. If the Act were confined to valid patents it would be almost or quite without use.
>
> * * * * *
>
> "This statute must be taken to mean that the patent is to be held good; and is to have the same effect against the United States that it would have had if it had been valid in the first place." (209 U. S. 450)

The essential parallel between the situation in the *Chandler-Dunbar* case and the situation in the instant case would seem to be very clear. In the former case the Government contended that the land was within a military reservation, had therefore been withdrawn from the jurisdiction of the Land Department, and accordingly the issue of the patent was unauthorized. Here the argument is that, although the lands were swamp lands, title had previously vested in the Government thus withdrawing the lands from the jurisdiction of the Land Department and accordingly the issue of these patents was unauthorized. We discover no difference going to the applicability of the statute of limitations.

Returning to the holding in the *Chandler-Dunbar* case, it was ruled that, whether the President as head of the Land Department had authority to make the patent,

> "the United States had power to make it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect."

The Government's position is not aided by referring to the language of the Court's opinion that "whether reserved or not" the land was "*in kind* open to sale and conveyance through the Land Department." Here also, except for the alleged fact depriving the Land Department of jurisdiction —*i.e.*, the claimed fact that the land was within the confirmation decree—the lands were "in kind open to . . . conveyance through the Land Department" and the Government concedes as much. (Govt. Br. 46)

The law is, we think, plain. Mr. Justice Holmes has made it clear that the statute is a bar provided, and provided only, that the interest of the United States alone is concerned. It is not without significance that the Government has cited no case where, the interest of the United States alone being involved, the statute was held not to apply.

There is no foundation for the final assertion in the brief of the Government on this point that our contention results in "the unthinkable consequence that, after six years, the Government would be powerless to attack any patent, however obtained and regardless of the site covered" (Govt. Br. 51). If a patent is issued through fraud or its equivalent, the Government has six years after the fraud is discovered within which to proceed. Surely this is ample protection, especially in view of the fact that if the United States is in possession of the land patented then, as the Government claims (Govt. Br. 38), the United States may also rely on adverse possession.

If the statute is to be held not to apply in a case such as the present, then, indeed, in the phrase of Mr. Justice

Holmes previously quoted, it is "almost or quite without use."

III.

EQUITABLE ESTOPPEL.

The Government's brief admits that the United States is subject, as a suitor, to "the general principles of equity" but denies that the rule means that "the legal rights of the United States are to be determined upon general notions of fairness without regard to precedent or established principles." (Govt. Br. 52)

Petitioners' defense of equitable estoppel is based upon the following circumstances, which are indisputably established upon this record:

1. These petitioners and their predecessors had been in undisturbed and undisputed possession of these lands for a great many years continuously. Their title was not questioned by the Government from 1890 when the decision in *Irwin* v. *San Francisco Savings Union* was affirmed by this Court (136 U. S. 578) until 1930 when this suit was brought, a period of 40 years.

2. There has been neither Government possession nor attempted possession of these lands since 1890.

3. All of these petitioners purchased their lands after patents had been issued by the Government. (Parenthetically, the Government brief is in error in reciting that the Sears Point Toll Road Co. constructed its toll road "*after* (*sic*) Congress granted a right-of-way across the lands in suit." (Govt. Br. 11) The fact is that the toll road was built ten years *prior to* the Congressional grant of 1936, as the Government's brief shows on the same page, and likewise prior to the institution of this suit in 1930.)

4. The three Government patents were issued 34 years, 20 years and nearly 6 years, respectively before the bringing of this suit. All were issued voluntarily, and the most recent patent was not issued until after the Secretary of the Interior had given notice to the Secretary of the Navy, who made no protest.

5. The State patent covering these lands was issued in 1874.

6. The expenditure made by these petitioners in the purchase and improvement of their lands have exceeded $300,000.

7. At no time during the period of 40 years extending from 1890 to 1930 has the Government, by act or word, claimed title in itself or challenged the finality of the *Irwin* decision.

8. In 1896 the Navy Yard Commandant assented to a survey for the purpose of fixing the boundary between these lands and the Government lands and such a survey was made.

9. In 1913 the Navy Department filed for record in the Recorder's Office for Solano County, California, a formal "Map Showing Location of U. S. Naval Reservation, Mare Island, Vallejo, Cal." The filing was in accordance with an Act of the California Legislature of 1897 ceding to the United States exclusive jurisdiction of lands occupied by the United States for military purposes or defense. This map (Ex. 9, R. IV-38) shows that the reservation did not cover any of the lands here in suit but stopped at the present Navy Yard boundary fence.

10. In 1914 the Navy Yard authorities constructed a fence along the southerly boundary of these lands, and that boundary fence has ever since continuously been maintained by the Government.

These are the main circumstances upon which petitioners have rested their defense of equitable estoppel, and we repeat that the facts outlined above have been indisputably established upon this record.

We would not have the Court confused by suggestions in the Government's brief that there has not been acquiescence by the Government in the *Irwin* decision. The Government brief refers to certain circumstances suggesting that the United States had not abandoned its claims to these lands, but it will be found upon examination that these references are primarily to the lands in Survey No. 34 involved in the *O'Donnell* case and that the record citations are to the rec-

ord in the *O'Donnell* case which is not before this Court. (Govt. Br. 12-13) The Government brief does not attempt to explain or excuse the failure of the Government, by word or act, from 1890 to 1930, to assert any claim to these lands or to challenge the title or possession of these petitioners. Beyond doubt there was acquiescence in the *Irwin* decision *as to these lands* from 1890 to 1930, and it avails the Government nothing to show that it was claiming the O'Donnell lands which lie *within* the Navy Yard boundary fence and which had been in the uninterrupted possession and use of the Government.

We pass to certain specific contentions advanced in the Government's brief.

First, it is suggested that petitioners' argument amounts to no more than a claim to a prescriptive title and it is argued that "mere occupancy of the public lands and improvements thereon gives no vested right therein as against the United States." (Citing cases) (Govt. Br. 53) We make no such contention and the cited cases are not in point. These petitioners are not "mere occupants" of Government lands. They hold title under solemn patents from the United States and they rely upon an adjudication of title which had stood unchallenged for 40 years.

Second, it is argued that a court of equity should not enforce "a colorable title, like that asserted by petitioners, because of a reluctance to oust intruders upon Government property." (Govt. Br. 54) Cases are cited suggesting that "In this way, the public domain would soon be appropriated by adventurers." (Govt. Br. 54, 65) But these petitioners have no merely "colorable title," they are not "intruders upon Government property" nor are they "adventurers" upon the public domain. The words in the Government brief have been ineptly chosen. They do not properly characterize the acts of these petitioners in relying upon Government patents and upon Government acquiescence in a decision as to title which had stood unassailed.

Third, it is represented, quoting from the majority opinion of the Circuit Court of Appeals, that the rights of those claiming under the State have been from the beginning "shrouded in doubt and uncertainty." (Govt. Br. 57) With deference, this characterization is quite unwarranted. The words could be applied to the O'Donnell lands which were continuously in the possession and use of the Government and as to which there has been no adjudication. They are not applicable to petitioners' lands which the Government had not claimed or possessed for more than a generation and title to which was adjudicated. Petitioners rightfully relied upon these long years of Government non-action.

Fourth, it is said that "Congress has never relinquished the Government's claim of title to the lands in suit" and that "The defense of equitable estoppel is therefore reduced to the charge that the United States is bound by the action or non-action of its officers." (Govt. Br. 59). The same arguments could with equal propriety be advanced on the part of the Government in the case of the *United States* v. *Chandler-Dunbar Water Power Co.* (1908) 209 U. S. 447. If contentions of this variety were to prevail, the defense of equitable estoppel could never be invoked successfully against the Government.[1]

The cases cited in this part of the Government's brief are not antagonistic to the authorities upon which we rely. For example, in *Utah Power & Light Co.* v. *United States* (1917) 243 U. S. 389, cited upon page 59 and elsewhere of the Government's brief, the Government was not seeking unquali-

[1]The Government brief relies upon Pomeroy's *Equity Jurisprudence* as authority for a supposed rule that before there can be an estoppel affecting title to land the legal owner must be guilty of "'intentional deceit' or at least of "that gross negligence which is evidence of an intent to deceive" (Govt. Br. 61-62). But the rule is not so narrow. Pomeroy has said under the caption "Acquiescence as an Estoppel to Rights of Property or of Contract," that "A fraudulent intention to deceive or mislead is not essential" (2 *Pomeroy's Equity Jurisprudence*, Fifth Edition; § 818).

fiedly to oust the power company. This appears clearly from the following statement taken from the opinion of this Court in that case:

> "The principal object of the suits, as is said in one of the briefs, is to test the validity of these asserted rights, and, if they be found invalid, to require the defendants to conform to the legislation of Congress or, at their option, to remove from the government lands." (243 U. S. page 403)

All that the Government really sought was compliance with Government laws, rules and regulations respecting the enjoyment of rights on lands within the national forests. (See also the opinion of the Circuit Court of Appeals in the same case below, 230 Fed. 328, 339-340). The Government was not seeking a forfeiture.

The case of *Causey* v. *United States* (1916) 240 U. S. 399, reviewed upon pages 55 and 56 of the Government's brief, involved a suit by the United States to cancel a patent issued through improper use of Government scrip. There the patentee and his assignee were wrong-doers, having obtained the patents through fraud. Being wrong-doers they were required to restore the title unlawfully obtained and could not claim equitable relief. These petitioners on the other hand are not wrong-doers.

The case of *Lee Wilson & Co.* v. *United States* (1917) 245 U. S. 24, upon which the Government also relies (Govt. Br. 59) was again a case of fraud, or of error so gross as to amount to fraud, and the Government acted upon the discovery of the fraud. The case simply holds that when fraud has been shown on the part of one who has secured title to Government lands the Government may not be estopped by acts of its administrative officers "before the discovery of the fraud."

The case of *Jeems Bayou etc. Club* v. *United States* (1923) 260 U. S. 561, was likewise a case of fraud or, in the language of the opinion of this Court in that case, there

was "such gross and palpable error as to constitute in effect fraud upon the Government" (260 U. S. 563-564).

The case of *Cramer* v. *United States* (1923) 261 U. S. 219, arose upon a suit brought by the Government on behalf of certain Indian wards to cancel a patent issued under the Railroad Act of 1866 upon the ground that certain of the lands embraced within the patent were at the time of the act and ever since had been occupied by these Indians and therefore were excepted from the railroad grant. The essence of the holding of the Court is disclosed by the following excerpt from the opinion (p. 234):

> "Since these Indians, with the implied consent of the government, had acquired such rights of occupancy as entitled them to retain possession as against the defendants, no officer or agent of the government had authority to deal with the land upon any other theory. The acceptance of leases for the land from the defendant company by agents of the government was under the circumstances, unauthorized, and could not bind the government; much less could it deprive the Indians of their rights." (Citing cases)

The case is not in point here.

As we appraise the cases upon which the Government relies, none of them can afford authority or warrant for the effort of the Government to dispossess these petitioners and forfeit their titles when they are innocent of any wrong-doing or of any charge of wrong-doing or bad faith. They have relied upon United States Government patents and upon a long standing adjudication of title.

Petitioners' case would seem to be both within the terms and responsive to the purpose of the rule of equitable estoppel which we invoke against this suit.

IV.

The Findings of the Trial Court That the Lands in Suit Are Not a Part of Mare Island and Were Not Within the Castro Grant or the Confirmation Decree Were Amply Supported by the Evidence and Should Have Been Accepted by the Court of Appeals.

In petitioners' opening brief it was shown, in discussing this issue, that the inequitable result of the judgment of the majority below could have been avoided by construing the confirmation decree as it is written—as embracing only the lands called Mare Island, which did not include any of the land in suit. The trial court found that none of this land was ever known as or called Mare Island, that none of it was embraced within the Castro grant nor within the confirmation decree, and that accordingly it passed to the State under the Swamp Land Act. These findings are supported by the overwhelming weight of the evidence. The majority in the court below have disregarded these findings and have failed to give them any effect though manifestly they are of controlling importance, as the dissenting opinion of Judge Mathews makes plain.

Upon this essential point the opposing argument (Govt. Br. 28-35) fails to meet us. No reason is shown why the call of the confirmation decree for "the place called 'Isla de la Yegua' or Mare Island" could not and should not have been given effect.

The evidence supporting the trial court's findings was reviewed in detail in the appendix to petitioners' opening brief. This review, though to some extent discussed in the opposing brief, has not been answered. So far as that discussion calls for a reply it will be found in the appendix hereto.

In the opening brief (page 63) attention was directed to the failure of the majority of the court below to accept the findings of the trial court, in derogation, as it seemed to us, from the requirements of Rule 52 (a) of the *Rules of Civil Procedure*. The brief of the Government does not in terms seek to justify this failure to observe the rule.

CONCLUSION.

The argument for the Government is brought to a close with the suggestion that "There may be circumstances indicating that petitioners, to the extent they are not insured, should be reimbursed by the Government for expenditures in improving the lands or for other costs * * *" (Govt. Br. 66). Thus, the essential injustice—*the inequity*—of this suit on the part of the United States appears at length to find implicit recognition in the Government's brief. While this concession aids the case for the petitioners, we can see neither reason nor justice in the suggestion that a distinction may be drawn between the petitioners and their insurers. The assured and their insurers alike have relied upon the circumstances which have given rise to an equitable estoppel.

This tardy recognition of the inequity in the Government's suit is marred by the suggestion that if the petitioners are to be "reimbursed by the Government" such relief must be obtained from the legislative department. (Govt. Br. 66) It is our view that the protection which petitioners seek against inequity may be found within "the sphere of judicial authority" and in this immediate cause.

Respectfully submitted,

J. M. Mannon, Jr.,
A. Crawford Greene,
Allan P. Matthew,
Robert L. Lipman,
Attorneys for Petitioners.

W. H. Spaulding,
Thomas E. Palmer,
McCutchen, Olney, Mannon & Greene,
Of Counsel.

Dated: Washington, D. C.
April 27, 1942.

APPENDIX.

The Grant to Castro Did Not Include the Lands in Suit Nor Were They Embraced Within the Confirmation Decree.

In petitioners' opening brief (pages 63-70) it was shown that the lands here in suit were not a part of Mare Island; were not, under the Mexican law, granted to Castro; and were not covered by the decree of the Board of Land Commissioners confirming the Castro grant. In the appendix to our brief the evidence as to the boundaries of Mare Island according to Mexican law was reviewed, showing that the island consisted of only the high land. The evidence as to what was called or known as Mare Island showed that nothing but the high land, and the high land alone, has never been known or called by that name.

It is significant that the Government's argument upon this point is entitled "The grant of Mare Island *to the United States* included the lands in suit." The description in the Bissell and Aspinwall deed to the Government is, as Mr. Justice Field said in the *Irwin* case, "more extensive than the one covered in the grant to Castro or by the Commissioners in the decree confirming the claim under it" (28 Fed. 714) and, as Mr. Justice Field went on to hold, Bissell and Aspinwall could not convey more than they acquired under the grant. We are concerned, therefore, with what was granted *to Castro*.

As to what, according to the Mexican law, passed by a grant of an island, the only answer to Professor Radin's clear testimony that only the land lying above highest high-water mark would pass is a bald statement that there is nothing in the Mexican law inconsistent with a grant of all of the land down to high-water mark. The case of *Jover* v. *Insular Government* (1911) 221 U. S. 623 is a case involving the powers of the Governor of the Philippines, where the land below highest high-water mark was granted for the specific purpose of reclamation and improvement, and is no authority that a grant by the Mexican Government under

the colonization law, such as we have here, would, without any specific mention, carry title to the land below the line of highest high-water. Such cases as the *Coronado Beach* case, *Teschemacher* v. *Thompson* and *Ward* v. *Mulford* merely held, as the Government has elsewhere claimed, that where land below highest high-water has been confirmed and patented it is too late to claim, collaterally, that the patent covers too much. No one of these cases goes so far as to hold that, under the Mexican law, a private grant on tide water goes to the line of ordinary high-water mark.

Nor does it advance the Government's case to argue (Govt. Br. 69) that under the civil law an island is a body of land entirely surrounded by water. The question yet remains—at what tide? The Mexican law answers this, as Dr. Radin testified, at the line of highest high tide throughout the year.

On the question of fact as to whether the lands in the "neck" were below the line of highest high-water, the Government wholly fails to meet us. In answer to petitioners' showing of the testimony of the eye witnesses that the "neck" was frequently overflowed in the late 1890's and early 1900's (Apdx. iv), before the artificial reclamation work was done, and the testimony of the Government's own witnesses as to the elevation of the tule swamp (Apdx. v-vii), the Government remarks that this was in 1900 and not in 1852. (Govt. Br. 70) The Government ignores the fact that its own witnesses testified that the natural process at the "neck" has been one of accretion or filling and not one of cutting (R. II—523, 590-592), so that conditions in 1890 were more, and not less, favorable to the Government than they were in 1852.

The Government again adverts to the sand ridge. We stated in our brief that none of the testimony showed any sand ridge in the narrows of the neck. (Apdx. xiii) The Government says in reply that it is plain from Lieutenant Smith's whole testimony that the ridge extended through Survey 34. (Govt. Br. 70-71) We repeat what we said in petitioners' opening brief,—that it is not without signifi-

cance that upon such a crucial point the Government has no specific testimony that there was a sand ridge at the narrows of the neck, that the eye witnesses testified that it was all tule marsh (Apdx. xiv) and that the Government's own map by Rousseau (Ex. S-1, R. IV—26) shows no sand ridge at this point.

In petitioners' opening brief we challenged the accuracy of the Government's Exhibit T (R. IV— 28), particularly at the critical Station 48. The Government answers by ignoring Station 48 and discussing stations at other points. (Govt. Br. 72) The Government brief does not deny that Captain Carlson testified as to how the line of 1852 is derived just as we said he did (Apdx. xv) nor that, as indicated by petitioners, the legend on the exhibit itself confirms that (Apdx. xv) nor, as petitioners pointed out, that the line of 1852 at Station 48 was not drawn as Captain Carlson and the exhibit itself said it should have been drawn. Nor does the Government undertake to state that the line of 1852 was correctly drawn as Station 48. Our argument is not answered—it is simply ignored.

The eye witnesses, as we have said, testified that the neck was frequently overflowed. (Apdx. iv) Far from showing that this was not so, the Government goes outside the record and quotes from the Joy report in the *O'Donnell* case (Govt. Br. 72) language which demonstrates that our own witnesses were correct:

> "The results of my investigations and observations while on the ground lead me to believe that there is no doubt that water at extra high tides, from San Pablo Bay, crossed over the narrow strip of land in secs. 14 and 15, at extra high tide and probably *at ordinarily high tides with a stiff wind from the southwest*, but that the water crossed over the shore of the Bay more in the manner of an overflow, a broad sheet or spillway, without any definite channel, and only in one direction to the northeast away from the Bay."

Upon the record it is plain that the land was frequently under water and, therefore, under the Mexican law all that

passed to Castro was the high land down to the line of highest high-water, which excluded all of the land in suit.

The concept of Mare Island according to the Mexican law conforms exactly with the popular understanding of what was called Mare Island. And it was the island named "La Yegua" that was granted to Castro. We have pointed out in some detail (the maps, the Sloat Board Report and the confirmation proceedings—Apdx. xvii-xxviii) the evidence showing that nothing but the high land was ever known or called by that name. The Government nevertheless challenges the trial court's finding. (Govt. Br. 32-35)

It is significant that the Government refers to no map supporting its claim. It is suggested, however, that because the Bissell and Aspinwall deed purported to cover more than the high land and because the Government from time to time claimed the swamp land in Survey 569 as being a part of Mare Island, this shows that the land was known as or called Mare Island. (Govt. Br. 33) This is not a reply. Petitioners' discussion of the Sloat Board Report (Apdx. xxii-xxvi) should be compared with that in the Government's brief. (Govt. Br. 34-35)

What was granted to Castro was the island named "La Yegua." The decree of confirmation expressly states that "the place of which confirmation is given is situate in the Bay of San Francisco and is called 'Isla de la Yegua' or Mare Island. . . ." (R. V-70) Accordingly, upon the record there was no warrant for the action of the majority of the Court of Appeals in overruling the finding of the trial court that the lands in suit were not a part of Mare Island, were not granted to Castro, and were not covered by the confirmation decree.